IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 8TH AUGUST 2007 / 17TH SRAVANA 1929

CRL.A.No. 1128 of 2001()

SC.98/1999 of I ADDL. SESSIONS COURT, KOLLAM

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APPELLANT/ACCUSED:

NIZAR, S/O. BASHEER,
SAKSHARA VEEDU, MUNDAKKAL EAST WARD,
MUNDAKKAL VILLAGE, KOLLAM DISTRICT.

BY ADV. SRI.ANCHAL C.VIJAYAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM(CRIME NO.252/1997)
OF KOLLAM WEST POLICE STATION.

BY PUBLIC PROSECUTOR SRI. THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.P. NO.6154 OF 2001 IN CRL. APPEAL NO. 1128 OF 2001.

DISMISSED

8.8.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 1128 OF 2001

Dated this the 8th day of August, 2007

JUDGMENT

The appellant is the sole accused in S.C. No.98 of 1999 on the file of the I Additional Sessions Court, Kollam. He faced trial for the offence punishable under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the N.D.P.S. Act").

2. The prosecution case against the appellant - accused was that on 12.11.1997 at about 12.30 in the afternoon, the accused attempted to hand over a packet of ganja weighing 4.800 grams to one Krishna Kumar, an under trial prisoner at the veranda of the Judicial First Class Magistrate's Court II, Kollam. To prove the case against the accused, the prosecution examined PWs.1 to 8 and produced Exts.P1 to P8 as well as MO.1 packet of ganja. No witness was examined on the side of the defence, but Exts.D1 to D4 were produced. After closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. Denying the charges levelled against him, the accused stated that the case was foisted against him and that he had come to the Judicial First Class Magistrate's Court II, Kollam to give evidence in a criminal case. Relying on the evidence

adduced by the prosecution, the trial court found the accused guilty under Section 20(b)(i) of the N.D.P.S. Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs.5000/- and in default of payment of fine, to undergo simple imprisonment for a further period of three months. Set off under Section 428 Cr.P.C. was also allowed to the accused. The above conviction and sentence are challenged in this appeal.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant raised the following contentions: (i) the trial court committed serious error in accepting the evidence of PWs.1 to 3, the Head Constable and two police constables attached to the A.R. Camp, Kollam to find that the appellant attempted to give MO.1 packet of ganja to an under trial prisoner at the veranda of the Judicial First Class Magistrate's Court II, Kollam as there is no independent evidence to support their versions, (ii) PW.8, the Sub Inspector of Police, Kollam West Police Station had not complied with the provisions of Sections 42 and 50 of the N.D.P.S. Act while MO.1 packet was recovered from the appellant, (iii) The evidence of PW.5 and Ext.P3

chemical analysis report do not tally with the prosecution case with regard to the quantity of ganja found in the possession of the appellant and (iv) the finding of the trial court that the appellant committed offence punishable under Section 20(b)(i) of the N.D.P.S. Act is not sustainable as the ganja found in the possession of the appellant was small quantity in which case he can be found guilty only under Section 20(A) of the N.D.P.S. Act.

5. The trial court relied mainly on the evidence of PWs.1 to 3. PW.3 was the Head Constable attached to the A.R. Camp, Kollam. He stated that on 12.11.1997 he along with PWs.2 and 3 and other four police constables had come to the Judicial First Class Magistrate's Court II, Kollam escorting 10 under trial prisoners and that while they were waiting on the veranda, the accused attempted to hand over a packet to one Krishna Kumar, an under trial prisoner. This witness further stated that he took possession of the packet and that on examination it was found to contain ganja. PW.1 further stated that he then prepared Ext.P1 report and produced the accused along with MO.1 packet before the Judicial First Class Magistrate's Court II, Kollam and that the learned Magistrate orally instructed him to produce the accused before the Kollam West Police. He further stated that on the basis of the oral instructions, he produced the

accused before the Sub Inspector of Police at about 2.30 p.m.

6. The evidence of PW.1 was corroborated by the evidence of PWs.2 and 3 though there were minor contradictions. Their evidence was not shattered even in cross-examination. PW.4 was a witness to Ext.P1. PW.5 was examined to prove Ext.P3 chemical analysis report. She stated that the material object sent for chemical analysis was ganja. She also stated that the packet contained 2.74 grams of gajna. PW.6 was the gold smith who weighed the ganja. PW.7 was the Circle Inspector of Police of Kollam West Police Station in whose presence search was conducted. PW.8 was the Sub Inspector of Police, Kollam West Police Station. He stated that on receipt of Ext.P1 report, he registered Crime No.252 of 1997 against the accused and prepared Ext.P4 First Information Report. This witness further stated that he continued the investigation and filed the final charge.

7. Relying on the evidence of PWs.1 to 3, the trial court found that the appellant attempted to give MO.1 packet to an under trial prisoner at the veranda of Judicial First Class Magistrate's Court II, Kollam. The trial court also accepted the evidence of the other witnesses and found that the prosecution succeeded in proving the case against the accused -

appellant. The finding of the trial court is based on evidence. The contention of the learned counsel that there was no independent evidence to support the evidence of PWs.1 to 3 regarding seizure of MO.1 from the appellant is also not justifiable as the trial court had found that PWs.1 to 3 were categoric in their evidence and there was no reason to disbelieve them. Hence, the non-examination of any independent witness will not discredit the evidence of PWs.1 to 3. Further, the contention regarding violation of the provisions of Sections 42 and 50 of the N.D.P.S. Act also deserves no consideration as the provisions of those sections are not applicable to the facts of this case. The trial court found that it was a chance recovery and not a recovery on the basis of any search as contemplated under the provisions of the N.D.P.S. Act. MO.1 packet was seized from the appellant when he attempted to give the same to an under trial prisoner. In the light of the above findings, this Court is of the view that the prosecution succeeded in proving the charge against the appellant.

8. The next question to be considered is whether, on the facts now proved, the appellant can be convicted under Section 20(b)(i) of the N.D.P.S. Act. The quantity alleged to have been seized from the appellant is below 5 grams. That apart, as per Ext.P3 chemical analysis report and the evidence of PW.5, the total quantity seized from the appellant was

only 2.74 grams. If so, the quantity of ganja seized from the appellant is only small quantity as prescribed under Section 20(A) of the N.D.P.S. Act. That being so, the conviction under Section 20(b)(i) of the N.D.P.S. Act is not sustainable. The appellant can be convicted under Section 20(A) of the N.D.P.S. Act.

9. In the above circumstances, the conviction entered against the appellant under Section 20(b)(i) of the N.D.P.S. Act is altered to Section 20(A) of the N.D.P.S. Act. The incident happened in the year 1997 and the appellant had in possession only small quantity of ganja. Moreover, the appellant was not involved in any previous case. Hence, this Court is of the view that a sentence of payment of fine of Rs.5000/- will meet the ends of justice. Accordingly, the appellant is convicted under Section 20(A) of the N.D.P.S. Act and he is sentenced to pay a fine of Rs.5000/- and in default of payment of fine, to undergo simple imprisonment for a period of six months.

With the above modification in the conviction and sentence, the Crl. Appeal is dismissed.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A.NO.1128/2001

JUDGMENT

8TH AUGUST, 2007.